Office-Supreme Court, U.S.
FILED
AUG 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-84

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1981

BEN BUNDO, JR. and BEN BUNDO, SR.
Appellants,

vs

MICHIGAN LIQUOR CONTROL COMMISSION,
Appellee.

ON DIRECT APPEAL FROM THE
SUPREME COURT OF MICHIGAN

# MOTION TO DISMISS OR AFFIRM

FRANK J. KELLEY
Attorney General

ROBERT A. DERENGOSKI
Solicitor General

A. C. STODDARD

RICHARD I. RUBIN
Assistant Attorneys General

525 West Ottawa St.
760 Law Building
Lansing, MI 48913
(517) 373-1124

PRINTED BY SPEAKER-HINES AND THOMAS, INC., LANSING, MICHIGAN—1981

## TABLE OF CONTENTS


| | Page |
|---|---|
| INDEX OF AUTHORITIES | ii |
| MOTION TO DISMISS OR AFFIRM | 1 |
| STATEMENT OF THE CASE | 2 |
| ARGUMENT | 4 |
| CONCLUSION | 5 |
| RELIEF REQUESTED | 6 |

## INDEX OF AUTHORITIES


**CASES** Page

Bundo v Liquor Control Commission, 92 Mich App 20; 283 NW2d 860 (1979); lv app den 407 Mich 900 (1979) 3

Bundo v Liquor Control Commission, (unreported) Docket No. 44113, decided April 9, 1980 (unreported) lv app den Docket No. 65089, decided April 15, 1981 .. 3

California v LaRue, 409 US 109; 93 S Ct 390; 34 L Ed2d 342 (1972); reh den 410 US 948; 93 S Ct 1351; 35 L Ed2d 615 (1973) ..... 2, 4

New York State Liquor Authority v Bellance, .... US ...., 49 US LW 3950 (No. 80-813, June 22, 1981) .... 4

Richter v Department of Alcoholic Beverages Control, 559 F 2d 1168 (CA 9, 1977); cert den 434 US 1046; 96 S Ct 891; 54 L Ed2d 797 (1978) ..... 5

**STATUTES CITED**

Michigan Liquor Control Act, § 7, 1933 PA 8; MCL 436.7; MSA 18.977 ..... 2

Michigan Administrative Procedures Act, 1968 PA 306; MCL 24.201; MSA 3.560(101) ..... 2

**MICHIGAN ADMINISTRATIVE RULES CITED**

1979 Michigan Administrative Code, Rule 436.37 ..... 2, 4

No. 81-84

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1981

---

BEN BUNDO, JR. and BEN BUNDO, SR.

Appellants,

vs

MICHIGAN LIQUOR CONTROL COMMISSION,

Appellee.

---

ON DIRECT APPEAL FROM THE
SUPREME COURT OF MICHIGAN

# MOTION TO DISMISS OR AFFIRM

COMES NOW, the Michigan Liquor Control Commission, Appellee herein, by their attorneys, FRANK J. KELLEY, Attorney General of Michigan and ROBERT A. DERENGOSKI, Solicitor General of Michigan, by A. C. STODDARD and RICHARD I. RUBIN, Assistant Attorneys General, and Moves to dismiss the appeal herein or, in the alternative, to affirm the decision of the Michigan Supreme Court, because the appeal does not present a substantial federal question, because any federal question present in the appeal is clearly controlled by recent dispositive decisions of this Court, and because it is manifest that the questions upon which the decision of the cause depends are so unsubstantial as not to need further argument.

## I.

## STATEMENT OF THE CASE

In 1972, the United States Supreme Court, in *California* v *La Rue*, 409 US 109; 93 S Ct 390; 34 L Ed2d 342 (1972); reh den 410 US 948; 93 S Ct 1351; 35 L Ed2d 615 (1973), indicated that a state liquor regulatory agency could promulgate rules of conduct which could prohibit nudity per se, provided the regulation was specific, and narrowly directed to establishments which it licensed to sell liquor by the glass.

As a result, Rule R 436.37[1] was adopted by the Appellee pursuant to Section 7 of the Michigan Liquor Control Act[2] and in accordance with the rule adoption procedures of the Michigan Administrative Procedures Act[3] and became effective on November 13, 1977.

Rule R 436.7 provides:

> "R 436.37. Nudity prohibited; applicability to electronic reproduction.
>
> "Rule 37. (1) An on-premise licensee shall not suffer or allow in or upon the licensed premises a person who exposes to public view the pubic region, anus, or genitals, as well as other types of nudity prohibited by statute or local ordinance.
>
> "(2) An on-premise licensee shall not suffer or allow in or upon the licensed premises the showing of films,

---

[1] 1979 Michigan Administrative Code, Rule 436.37

[2] § 7, 1933 PA 8; MCL 436.7; MSA 18.977

[3] 1969 PA 306; MCL 24.201; MSA 3.560(101)

television, slides or other electronic reproduction depicting scenes wherein any person exposes to public view the pubic region, anus, or genitals, as well as other types of nudity prohibited by statute or local ordinance. This prohibition shall not apply to any publicly broadcast television transmission from a federally licensed station."

On November 29, 1977, the Appellants violated the rule and were cited administratively by the Appellee for the violation.

The Appellants filed a declaratory action in the Michigan Courts and in 1979 the Michigan Courts declared the rule to be constitutionally valid. *Bundo* v *Liquor Control Commission*, 92 Mich App 20; 283 NW2d 860 (1979); lv app den 407 Mich 900 (1979).

Subsequently, the administrative matter worked its way through the state judicial system and, on April 9, 1980, in a memorandum opinion, the Michigan Court of Appeals, relying on its previous *Bundo* decision, affirmed the constitutional validity of the rule. *Bundo* v *Liquor Control Commission*, (Docket No. 44113, decided April 9, 1980). On April 15, 1981, the Michigan Supreme Court again denied leave to appeal (Docket No. 65089, decided April 15, 1981).

The appeal herein followed.

## II.

## ARGUMENT

Rule R 436.37 is a very clear and concise statement of prohibited conduct. It is also very narrowly limited in its effect and scope. It prohibits the exposure to public view of a persons pubic region, anus or genitals and is directed only to persons in the State of Michigan who are licensed by the state to sell alcoholic liquor by the drink.

In *California* v *La Rue, supra,* the United States Supreme Court recognized that the prohibition of the rule was constitutionally permissible if narrowly limited in scope. In that case the United States Supreme Court held:

> "While we agree that at least some of the performances to which these regulations address themselves are within the limits of constitutional protection of freedom of expression, the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments which it licenses to sell liquor by the drink."

Recently, the United States Supreme Court re-affirmed its position in *New York State Liquor Authority* v *Bellanca,* .... US ...., 49 US LW 3950, (No. 80-813, June 22, 1981), when it said:

> ". . . the elected representatives of the State of New York have chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell liquor for on-premises consumption. Given the 'added presumption in favor of the state regulation' conferred by the Twenty-first Amendment, California v. LaRue, supra,

at 118, we cannot agree with the New York Court of Appeals that the statute violates the United States Constitution. Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment. Although some may quarrel with the wisdom of such legislation and may consider topless dancing a harmless diversion, the Twenty-first Amendment makes that a policy judgment for the state legislature, not the courts."

## III.

## CONCLUSION

Every time the question about nudity in bars has been raised in the United States Supreme Court, the Court has either held that a State may prohibit such conduct, *California* v *LaRue, supra; New York State Liquor Authority* v *Bellanca, supra,* or has refused to even review a lower court holding that a state may prohibit such conduct, *Richter* v *Department of Alcoholic Beverage Control,* 559 F2d 1168 (CA 9, 1977); cert den 434 US 1046; 96 S Ct 891; 54 L Ed2d 797 (1978).

Thus, the question has been decided adversely to the Appellants each time it has been presented to the United States Supreme Court and the Appellants have failed to raise any new or different reasons upon which the United States Supreme Court should act in this matter. The Appellants have, therefore, failed to raise any constitutional question of a nature substantial enough to be deserving of a consideration by the United States Supreme Court.

## IV.

## RELIEF REQUESTED

WHEREFORE, it is prayed that the United States Supreme Court will affirm the decision of the Michigan Supreme Court or, in the alternative, dismiss this entire matter for lack of a constitutional question of a substantial nature.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

ROBERT A. DERENGOSKI
Solicitor General

A. C. STODDARD (P 21045)
Assistant Attorney General

RICHARD I. RUBIN (P 19735)
Assistant Attorney General

2251 Dix Highway
Lincoln Park, MI 48146
(313) 383-4000